IN THE HIGH COURT OF JUDICATAURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Administrator, Municipal Council, Bikaner & anr. vs. Smt. Mala & ors.

S.B.Civil Misc.Appeal No.354/1992 against the order dated 13.11.1990 passed by the learned Workmen's Compensation Commissioner,Bikaner in Case No. W.C. No.11/90

Date of Judgment: October 11, 2006.

PRESENT.
HON'BLE MR. PRAKASH TATIA, J.

Mr. Shyam Ladrecha for the appellant.
Mr. S.N.Trivedi for the respondent.

BY THE COURT:

Since Shri Gopi Kishan Vyas, Advocate unfortunately died and Shri Shyam Ladrecha is normally appearing on behalf of the Municipal Board, Bikaner and, therefore, he is directed to appear on behalf of the appellant.

The appeal is preferred against the award passed by the learned Workmen Compensation Commissioner, Bikaner in Case No. W.C.11/90.

Brief facts of the case are that applicants-legal representatives of deceased Murli employee of the appellant, submitted this claim petition before learned Workmen Compensation Commissioner, Bikaner on 23.5.1990. According to the claimants-respondents, deceased Murli was

in the employment in the Municipal Board, Bikaner. While working on duty, he died on 20.8.1988 when he was cutting some tool from the tractor trolley. He suffered injury on the head and died, for which a report was lodged by the Commissioner, Municipal Council, Bikaner on the same day on 20.8.1988 at 11 p.m. The post-mortem was conducted on the same day and the cause of death was found injury on head. The claimants placed on record copy of the report recorded by the police as well as the copy of the post-mortem report. The learned Workmen Compensation Commissioner, Bikaner on 19.6.1990 passed the ex parte order against the appellant Municipal Board, Bikaner and ultimately decided the claim case vide impugned order dated 13.11.1990 and awarded the total compensation of Rs.93,542/-.

The grievance of the appellant is that in fact the learned counsel for the appellant appeared before learned Workmen Compensation Commissioner, Bikaner on 19.6.1990 and submitted power. He sought time to file reply, upon which the case was adjourned to 4.8.1990. On 4.8.1990, since the learned counsel for the appellant was not available in the Bikaner City, therefore, he sent another advocate to take next date, upon which next date was given as 22.9.1990. On 22.9.1990, the appellant's counsel came to know that the evidence of the applicant is being recorded. He was shocked and submitted an application 25.9.1990 narrating all the facts. He also submitted his affidavit and colleague's

affidavit which was sworn on 24.9.1990. According to the learned counsel for the appellant, despite moving application on 25.9.1990, the learned Workmen Compensation Commissioner, Bikaner proceeded to decide the main claim petition itself without deciding the appellant's application for setting aside the ex parte order. According to the appellant, learned Workmen Compensation Commissioner, Bikaner told the counsel for the appellant that the application of the appellant for setting aside the order will be considered after getting the reply from the applicant-respondent on 16.10.1990, but this fact is also not recorded any where in the file before the learned Workmen Compensation Commissioner, Bikaner. The learned Workmen Compensation Commissioner, Bikaner, without deciding the said application, decided the claim petition and passed the award dated 13.11.1990. Upon this, the appellant submitted yet another application on 13.11.1990 and prayed that the appellant's application be decided which was filed for setting aside the ex parte order against the appellant on 24.9.1990. According to the learned counsel for the appellant, in view of the above facts, it is clear that no opportunity of hearing was given to the appellant by the learned Workmen Compensation Commissioner, Bikaner before passing the award. It is also submitted that *Vakalatnama* filed by the learned counsel for the appellant before the learned Workmen Compensation Commissioner,

Bikaner and all applications and their copies and affidavits of the learned advocates are very much available on record of the learned Workmen Compensation Commissioner, Bikaner and from the order-sheets it is clear that none of the application has been dealt with by the learned Workmen Compensation Commissioner, Bikaner any where in the file despite the fact that the presentation on the application is recorded.

The learned counsel for the respondents submitted that the fact is not in dispute that the employee died while working in the employment with the appellant. This fact was reported to the police by none else than the Commissioner of the Municipal Council,Bikaner and the post-mortem report is available on record. In view of above, it will be absolutely unjust to set aside the award so as to recover the amount from the respondents which was paid in pursuance of the order of this Court wherein this Court has directed the learned Workmen Compensation Commissioner, Bikaner to pay 50% of the award amount to the claimants on furnishing solvent security.

So far as opportunity of hearing to the appellant-non-applicant is concerned, that has not been given. This fact is proved from the record. Not only the applications submitted by the learned counsel but the affidavits of the learned counsels were not dealt with by the learned Workmen Compensation Commissioner, Bikaner. How the learned

Workmen Compensation Commissioner, Bikaner could have decided the main petition without deciding the application for setting aside the ex parte order. Be it as it may be, the learned Workmen Compensation Commissioner, Bikaner has committed gross error of law in deciding the claim petition without considering the application filed by the appellant-non-applicant for setting aside of the ex parte order. It will be worthwhile to mention here that in the file, power is also very much available of the appellant filed by their counsel on the date when it was recorded that no body appeared on behalf of the appellant. Therefore, the order of the learned Workmen Compensation Commissioner, Bikaner is absolutely illegal and deserves to be set aside.

In view of the above, the appeal deserves to be allowed and hence allowed. The order of the learned Workmen Compensation Commissioner, Bikaner dated 13.11.1990 is set aside. The order of the learned Workmen Compensation Commissioner, Bikaner dated 19.6.1990 is also set aside. However, it is made clear that till the decision of the matter afresh by the learned Workmen Compensation Commissioner, Bikaner, the amount already paid to the claimants, shall not be recovered in view of the fact that at this stage, two important documents are available on record which are disclosing that the employee died during employment and while discharging duty under the employment and the matter was reported to the police by the none else

than the officer of the Municipal Council, Bikaner. This is because of the reason that the employee died in the year 1990 and the claimants are widow and two children and they have already furnished the solvent security and the amount must have been paid to them and the security will take care for refund of the amount in case the claim of the claimants is dismissed by the learned Workmen Compensation Commissioner, Bikaner. It is further made clear that any observation on merit for grant of relief to the claimants inspite of setting aside of the award, that shall not come in the way of the appellant-non-applicant in contesting the case before the learned Workmen Compensation Commissioner, Bikaner.

Both the parties are directed to appear before the learned Workmen Compensation Commissioner, Bikaner on 1.11.2006.The appellant Municipal Council, Bikaner shall file the reply by or before 1.11.2006 and the learned Workmen Compensation Commissioner, Bikaner is requested to decide the claim afresh without influenced by the earlier orders or any observations made by this Court in this order within a period of four months thereafter.

(PRAKASH TATIA),J.

mlt.